Supreme Court of the United States

OCTOBER TERM, 1933

No. 94

M. D. HICKLIN, INDIVIDUALLY, AND AS A REPRESENTATIVE OF CLASS "F" CARRIERS WITHIN THE PROVISIONS OF SECTIONS 8507–8530 OF CHAPTER 162 OF THE SOUTH CAROLINA CODE OF 1932, WHO ARE, OR CLAIM TO BE, ENGAGED IN INTERSTATE COMMERCE, AS WELL AS INTERSTATE OPERATIONS WITHIN THE STATE OF SOUTH CAROLINA, APPELLANT,

versus

J. C. CONEY, EARLE R. ELLERBE, SAM C. BLEASE, J. H. NANCE, THOMAS H. TATUM, J. A. BEAMGUARD AND B. J. PEARMAN, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF SOUTH CAROLINA, APPELLEES.

ARGUMENT FOR APPELLEES

JOHN M. DANIEL,
Attorney General.
IRVINE F. BELSER,
Special Counsel.
Attorneys for Appellees.

SYNOPSIS AND INDEX

	PAGE
INTRODUCTORY SUMMARY	1
STATEMENT OF FACTS	3
The Provisions of the Motor Regulatory Act	3
Pleadings Show Farmers and Dairymen Make Relatively Slight and Infrequent Use of Highways	6
Act Upheld by South Carolina Supreme Court	9
ARGUMENT	11
I. EXEMPTION IN FAVOR OF FARMERS OR DAIRYMEN VALID BECAUSE THEIR USE OF HIGHWAYS SLIGHT AND INFREQUENT	11
Authorities Show Such Exemption in Favor of Farmers and Dairymen Valid	15
Act Construed as not Exempting Farmers and Dairymen if Regularly Engaged in Transport Hauling	24
Smith v. Cahoon, 283 U. S. 553, Distinguished	25
II. PROVISIONS AS TO CARGO INSURANCE AND REGULATION OF RATES AND FARES NOT ATTEMPTED TO BE ENFORCED	27
III. LICENSE FEES BASED ON CARRYING CAPACITY IN TONS VALID AND REASONABLE	29
IV. GENERAL APPROPRIATION ACT OF 1932 NOT PROPERLY INVOLVED	34
SUMMARY AND CONCLUSION	35

TABLE OF CITATIONS

CASES CITED

	PAGE
Alward v. Johnson, 282 U. S. 509, 513, 514, 75 L. ed. 496, 499, 75 A. L. R. 9, 51 S. Ct. 273	1, 12, 17
Bekins Van Line v. Riley, 280 U. S. 80, 82, 74 L. ed. 178, 180, 50 S. Ct. 64	1, 12, 17
Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623	1, 12
Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199	2, 32
Continental Baking Co. v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816	2, 9, 12, 15, 17, 20, 25, 28
Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 75 L. ed. 953	32, 33
Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551	2, 29, 30, 34
Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445	2, 28, 29, 30
Michigan C. R. Co. v. Michigan R. Commission, 136 U. S. 615, 59 L. ed. 750	2, 29, 30
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596	1, 12
Schwartzman Service, Inc. v. Stahl, 60 Fed. (2d) 1034	1, 9, 12, 15, 21, 25, 26
Smith v. Cahoon, 283 U. S. 553, 568, 75 L. ed. 1264	2, 9, 12, 15, 16, 20, 25, 26, 27
Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167	1, 9, 12, 15, 18, 25
Stephenson v. Binford, 77 L. ed. 203 . . U. S.	1, 2, 9, 12, 22, 25, 28

STATUTES CITED

South Carolina Code 1932, Secs. 8507–8524	3
37 South Carolina Statutes at Large, 1557 at p. 1606, (S. C. General Appropriation Act of 1932 (Sec. 34, Act No. 897))	34

INTRODUCTORY SUMMARY

This appeal challenges the constitutionality of the South Carolina Motor Regulatory Act of 1925 as amended.

The principal question involved in the appeal is whether the exemption contained in the Act in favor of "farmers or dairymen hauling dairy or farm products" renders the Act unconstitutional. Another contention is that the provision of the Act basing the amount of the license fees upon the carrying capacity in tons of the vehicles is invalid.

The evidence shows that farmers and dairymen use the highways only spasmodically and seasonally, and that the use made by them of the highways is relatively insignificant as compared with the use by appellant and others regularly engaged in the business of motor transportation. Also farming and dairying lie at the foundation of the economic structure of South Carolina.

It is submitted that the exemption in favor of "farmers or dairymen hauling dairy or farm products" is valid under the principle that the legislature in making its classifications is entitled to consider "character and frequency of use" and consequent wear and tear on the highways, and also because agricultural operations are entitled to special consideration on account of being essential to the public welfare.

Stephenson v. Bainford, 77 L. ed. 203,—U. S.—;
Baking Company v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816;
Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623;
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596;
Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167;
Alward v. Johnson, 282 U. S. 509, 513, 514, 75 L. ed. 496, 499 75 A. L. R. 9, 51 S. Ct. 273;
Bekins Van Lines v. Riley, 280 U. S. 80, 82, 74 L. ed. 178, 180, 50 S. Ct. 64;
Schwartzman Service, Incorporated v. Stahl, 60 Fed.

Cf. *Smith v. Cahoon*, 283 U. S. 553–568, 75 L. ed. 1264

Also it is submitted that the license fees being based on the carrying capacity in tons of the vehicles bear a reasonable relation to the amount of use to be made of the highways by such vehicles and hence are valid.

Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445;

Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551;

Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750

Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199

Also to the further objections against the provisions relating to "cargo insurance" and authorizing the Commission to regulate appellant's rates and fares, no attempt has been made to enforce these provisions and hence these objections should be disregarded.

Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 816;

Stephenson v. Binford, 77 L. ed. 203

STATEMENT OF FACTS

This argument is being prepared at this time (November 10th), by appellees' counsel without having received either a copy of the appellant's argument or of the printed record, the Clerk of this Honorable Court having notified appellees' counsel by letter of October 27th that the record had not yet been printed "due to the fact that the deposit requested to cover costs has not been made".

This appeal challenges the constitutionality of the South Carolina Motor Regulatory Act of 1925 as amended, contained in the South Carolina Code of 1932, Sections 8507-8524.

This is an appeal from a decision of the South Carolina Supreme Court, filed January 27, 1933, upholding the said Act, and granting a Writ of Injunction against the appellant and others operating over the highways of the State of South Carolina without complying with the provisions of the said Act.

The principal question sought to be raised by this appeal, as we understand, is whether the exemption contained in the said Motor Regulatory Act in favor of "farmers or dairymen, hauling dairy or farm products" (Section 8508), renders the said Act unconstitutional as depriving the appellant of equal protection of the laws.

The facts out of which this case has arisen are briefly as follows:

The Provisions of the Motor Regulatory Act

The State of South Carolina has a system of hard surfaced roads, for which the state has outstanding a large bonded indebtedness.

In 1925 the State Legislature of the State of South Carolina passed a Motor Regulatory Act, which is now contained in the Code of 1932 in sections 8507 through 8524. This Act provides for the issuing of different classes of cer-

tificate (section 8510), the classifications being for certificates A, B, C, D, E and F; the class F certificate (which is here involved) being provided for "any person, firm or corporation proposing to engage in the business commonly known as contract hauling of freight or property, and when such applicant does not propose to operate upon a regular schedule or over a regular route, or solicit or receive patronage along the route".

The Act also provides for indemnity insurance (section 8511) and also for "applications and license fees" (section 8512), the amount of the license fees for the class F carriers being based upon the carrying capacity as shown in tons." The Act also contained a provision (section 8517) regulating the "use of the fees collected", and providing for the apportionment of the fees between the roads of the highway system and the county highway systems and the streets of the cities and towns, according to use. The Act also contained a provision (section 8521) providing that if any section or clause should be held unconstitutional, such decision should not affect the validity of the remaining portions of the Act; and also a provision (section 8522) that the Act should not be construed to prevent the use of any motor vehicle for the purpose of making some particular trip "where the owner of such vehicle does not make such transportation a business".

Section 8508 of the said Act, which raises the principal question in this case, was as follows:

> "No corporation or person, their lessees, trustees, or receivers, shall operate any motor-propelled vehicle as hereinbefore defined for transportation of persons or property for compensation on any improved public highways in this State, except in accordance with the provisions of Sections 8507 to 8524, and such operation shall be subject to control, supervision and regulation by the commission in the manner provided by Sections 8507 to 8524; Provided, however, that nothing in sections 8507 to 8524 contained shall apply to motor vehi-

cles while used exclusively for transporting persons to and from schools, Sunday Schools, churches, or religious services of any kind, or to or from picnics or upon special prearranged excursions, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber and logs from the forests to the shipping points."

The appellant, Hicklin, "has been for several years engaged in the business of motor transportation as a contract hauler of freight and property for compensation over the highways of the State of South Carolina", and comes within the class of carriers known as class F carriers, but has refused to comply with the provisions of the said motor transportation Act, or to pay the license fees provided for therein; his alleged reason for refusing compliance being that the said Act is unconstitutional (see paragraphs 2, 3 and 4 of the petition of appellees in the Court below, and paragraphs 1 and 2 of the appellant's return and answer in said Court).

On August 3, 1932 the appellees herein instituted a suit in the original jurisdiction of the South Carolina Supreme Court for the purpose of having the said Act enforced as against the appellant and of requiring the appellant and others to comply therewith, or, in the alternative, to enjoin and restrain them from operating over the highways of the state. This suit was instituted by a rule to show cause signed by a Justice of the Supreme Court, returnable before the Supreme Court at the next (October 1932) term of the said Court.

This petition alleged substantially the facts as above stated.

To this petition appellant filed his return and answer, claiming particularly (in par. 5) that the said Act was unconstitutional by reason of exemptions in favor of "farmers or dairymen, hauling dairy or farm products", and also for

certain other reasons as set forth in paragraphs 6 and 7, but admitting substantially all the allegations of fact contained in the petition (see paragraphs 1 and 2 of said return and answer). The appellant also filed a demurrer to the said petition.

Upon the receipt of these pleadings on behalf of the appellant, counsel for the appellees served a notice, dated September 10th, on appellant's counsel for an order of reference "to a suitable Referee to take such testimony as may be desired to be offered by the parties herein on the issues involved." Said notice also stated that the motion was made for the purpose of expediting the trial and determination of the case, but without waiving the position that the case was pending in all particulars for trial by the Supreme Court of South Carolina, and that for such reason the motion would not be pressed against objection by the respondent. To this notice appellees' counsel replied by letter, objecting to having the issues referred to a referee. This letter was dated September 15th, and is made a part of the record in this cause.

Appellees' counsel thereupon obtained leave from the Justice of the Supreme Court authorizing the filing of a verified reply on behalf of the appellees herein, and giving the appellants the right, if they desired to controvert any of the facts set forth in the reply, to file any further counter-reply or rebuttal as they might be advised.

Pleadings Show Farmers and Dairymen Make Relatively Slight and Infrequent Use of Highways

This reply, so served, contained the following statement of facts, as to which there was no denial filed by the appellants:

> "That moreover, the petitioners know of their own personal knowledge, and this Court should take judicial notice thereof, that farmers and dairymen, insofar as they use the highways of the State of South Carolina at all, use them only seasonally and spasmodically; that

there are practically only two seasons in the year when there is any occasion whatsoever for the farmers to make any use of the highways, that is during the months of May, June, and July, when certain truck crops are harvested, and during the fall months of September, October, and November, when the staple crops, such as cotton, corn and peas, are harvested, but that the use made by farmers of the said highways is very small and relatively insignificant as compared with the use made of such highways by the respondents and others regularly engaged in the business of contract hauling for compensation over the highways of the State of South Carolina:

"That moreover such farmers and dairymen as do use the highways of the State of South Carolina generally have very small and light trucks and engage in only very short hauls:

"That on the contrary respondents and others in like situation engaged regularly in the business of transport hauling make a much more extensive use of the highways, operating throughout the State from one end to the other, and furthermore use much heavier and larger trucks. Consequently, the wear and tear upon the highways in the State of South Carolina from persons regularly engaged in contract hauling for hire, such as the respondents herein, is much more serious than that occasioned by farmers and/or dairymen, and/or lumber hauling:

"That in general the same statements hereinabove made as applicable to farmers are also applicable to dairymen and lumber haulers, and that as hereinabove shown in the regulation promulgated by this Commission, when and if farmers and/or dairymen engage regularly in the business of hauling for others for compensation, they are no longer deemed to be farmers or dairymen for the purpose of this Act and, hence

are required to comply with the Act like all other persons engaged in transportation for hire."

Attached to this reply, also, and made a part thereof, was an affidavit by W. W. Goodman, Superintendent of the Motor Transport Division of the Railroad Commission of the State of South Carolina. This affidavit contained, among others, the following statements of fact, which are also uncontradicted:

> ". . . **that, he knows of his own knowledge that the Railroad Commission has not and is not exempting any persons from the payment of the tax who is carrying on the business similar to the respondent in this action;** that, there are a number of farmers, dairymen, and lumbermen, paying the tax when they operate on the highways for compensation, as does the respondent herein; . . . but no person is operating on the highways for compensation as a part of a regular business with the approval or consent of the Commission, without obtaining the Certificate and paying the fees." (Emphasis ours.)

The appellants filed no further pleadings of any sort and filed no rebuttal evidence as to any of the facts contained in this reply.

Thereafter, on October 3, 1932, appellees' counsel served the appellants with notice of a motion to the effect that they would call up the case for hearing on Tuesday, October 11th, and would move the Court to strike out the demurrer and grant judgment for the relief prayed for in the petition, and that said motion was based upon the pleadings.

The case was argued before the South Carolina Supreme Court upon the pleadings and upon the record as made, in accordance with the said notice, on October 11, 1932.

Thereafter the South Carolina Supreme Court handed down a decision on January 27, 1933, overruling the demurrers filed by the appellants, sustaining the Act, and granting the relief prayed for in the petition.

Act Upheld by South Carolina Supreme Court

The South Carolina Supreme Court held in effect, as will be seen by reference to the decision incorporated in the record herein, that the exemptions contained in the Act in favor of farmers or dairymen hauling dairy or farm products, did not render the Act unconstitutional for the reasons that the use made by the farmers and dairymen of the highways was only occasional and seasonal, and very light as compared with the use made by the appellants and others in like situation, and also for the further reason "that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare."

In its decision the South Carolina Supreme Court cited and relied upon the case of *Continental Baking Company v. Woodring*, 286 U. S. 352, 76 L. ed. 816; and also *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1176; *Schwartzman Service v. Stahl*, 60 Fed. (2) 1034; and *Stephenson v. Binford*, 77 L. ed. 203; and distinguished the case of *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264. That Court also made the following findings and conclusions of law and fact:

> "The petitioners contend that the *Cahoon case* may be validly distinguished in the cases at bar as it was in the cases cited, and in this we agree. In the first place, in the *Cahoon case*, the Court was dealing with a criminal prosecution, which point it stressed, saying: 'It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the Court as to validity and scope.' The cases before us are suits in equity, in which this Court is asked to construe the Acts in question. Also, in that case, the discrimination was in favor of 'any transportation company' engaged in hauling the class of products therein mentioned, while in the cases at bar the discrimination is in favor of farm and dairy products only when hauled by farmers and dairymen, and in favor of lumber haulers engaged in transporting lumber and logs from the forest to the shipping points. In other words, there is a double

element involved in the classification in this case, the class of persons and the class of products, while there was only one element of classification involved in the *Cahoon case,* namely, the class of products.

"It must be conceded, as has been held in *German Alliance Insurance Company v. Kansas,* 233 U. S., 389, that even though an exemption operates as a discrimination, it is not necessarily invalid; and, also, as is generally held, that a classification or discrimination should be allowed to stand unless it is entirely arbitrary. Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying. As pointed out in the *Woodring case,* there is a practical difference between such use of the highways and that made by the respondents in this case, 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers,' the Court holding, as we have seen, that the Legislature in making its classification was entitled to consider frequency and character of use, etc. In addition, there is this material consideration, that farming and dairying lie at the foundation of our economic structure and are essential to the public welfare."

The Court also adversely disposed of the other contentions made by the appellant in that Court; fixing (in Section II), that the Act, properly construed, did not require the appellants or other contract carriers to carry cargo insurance; holding that the failure of the Railroad Commission to undertake to fix the rates and schedules of the appellants rendered that objection made by the appellants academic; holding also, as to the provision of the Act basing the amount of the license fees upon the carrying ca-

pacity, that such fees were collected "for the purpose of maintaining the public highways over which such motor vehicles shall operate as compensation for their use"; and further, that they "are reasonable as to amount, and tend to contribute protection of the highways".

The appellant, Hicklin, as we understand from his petition for appeal and assignment of errors, and from his "Statement as to the Jurisdiction of the Court," and also from the subsequently filed statement of points (filed on May 23, 1933) seeks to raise substantially the same questions as were raised before the South Carolina Supreme Court, hereinabove mentioned.

The decision of the South Carolina Supreme Court, quoted in the record herein, also dealt with the case against the *Blalock Motor Express, Inc.*, but the said Blalock Motor Express, Inc., has failed to file the bond required by the South Carolina Supreme Court in allowing the appeal, and consequently its appeal has been abandoned, and that portion of the decision of the South Carolina Supreme Court relating thereto, and also the assignments of error relating to that appeal (see Assignment No. 4), are not here involved.

It is our position, and it is respectfully submitted, that the decision of the South Carolina Supreme Court is sound and is sustained by the record in the case and by decisions of this Honorable Court, and that the judgment of that Court should be affirmed.

ARGUMENT

I.

Exemption in Favor of Farmers or Dairymen Valid Because Their Use of Highways Slight and Infrequent

It is submitted that the exemption in the Motor Regulatory Act in favor of "farmers or dairymen hauling dairy or farm products" is entirely valid under the established prin-

ciple that the Legislature "in making this classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations", and also because farming and dairying are essential to the public welfare and hence are entitled to special consideration.

Stephenson v. Binford, 77 L. ed. 203,—U. S.—;
Baking Company v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 816;
Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623;
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596;
Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167;
Alward v. Johnson, 282 U. S. 509, 513, 514, 75 L. ed. 496, 499, 75 A. L. R. 9, 51 S. Ct. 273;
Bekins Van Lines v. Riley, 280 U. S. 80, 82, 74 L. ed. 178, 180, 50 S. Ct. 64
Schwartzman Service, Incorporated v. Stahl, 60 Fed. (2) 1034.
cf *Smith v. Cahoon,* 283 U. S. 553, 568, 75 L. ed. 1264.

It is earnestly and respectfully submitted that the exemption contained in this Act in favor of farmers or dairymen hauling dairy or farm products is not in any proper sense arbitrary, but is based upon sound economic considerations, and is valid.

This conclusion, it is submitted, rests both upon the principle that the Legislature in fixing its classifications is entitled to consider the frequency and character of the use to which the highways are put, and the consequent wear and tear thereon, and upon the principle that the Legislature, in the exercise of its duty to prescribe for the public welfare, is justified in making a distinction in favor of the basic industries of farming and dairying, which are essential to the public welfare.

The uncontradicted evidence in this case clearly establishes that the use of the highways by the farmers or dairymen is only seasonal and spasmodic; that, in fact, there are only two seasons of the year when the farmers make any use of the highways for the purpose of hauling farm prod-

ucts—that is, during the months of May, June and July, when truck crops are harvested; and during the fall months of September, October and November, when the staple crops, such as cotton, corn and peas, are harvested. Moreover, it is likewise established by the evidence that the farmers generally have very small and light trucks, and engage in only very short hauls. On the other hand, the appellant and those in like situations, who are regularly engaged in the business of transport hauling, make a much more extensive use of the highways, operating throughout the state from one end to another, and use much heavier and larger trucks. Hence the wear and tear upon the highways from the appellant and others in like situations is much more severe than that arising from the use by the farmers or dairymen when hauling their farm and dairy products. As was stated in the verified reply herein, the use made by the farmers of the highways is small and relatively insignificant.

The same facts as above stated with relation to farmers apply in large measure to the use of the highways made by dairymen.

Moreover, the South Carolina Supreme Court has construed this exemption as operating only in favor of those "whose principal business is that of a farmer or dairyman, and not to one who merely incidentally engaged in farming or dairying." It therefore follows necessarily, as a matter of common sense and common knowledge that one whose principal business is farming or dairying, cannot make anything like the extensive use of the highways that is made by those regularly engaged in transport hauling as a principal occupation or business. It is a matter of which all courts may take judicial knowledge that the matter of transport hauling is in a highly progressive state and that it is to a large extent now almost supplanting the railroad freight business, and that those who regularly engage in transport hauling, as is the case with appellants herein, operate whole

fleets of large and heavy trucks from one end of the state to the other.

It is earnestly submitted that it must be apparent to this Honorable Court, as was found by the South Carolina Supreme Court and as is shown by the record herein, that the use made by farmers or dairymen—that is, those who principal business is, in fact, farming or dairying,—cannot really be comparable to the use which is made by such regular transportation companies and concerns.

Also it is respectfully submitted that the Legislature of the State of South Carolina was fully justified in the performance of its duty to promote the public welfare in making a distinction or discrimination in favor of farming and dairying, both in favor of the individuals comprising that much distressed occupation, and also in favor of the products of such occupation. The exemption in this case takes on a double aspect in that it operates only in favor of farmers and dairymen when hauling farm and dairy products. The benefit of the exemption, therefore, runs directly and exclusively in favor of farmers and dairymen. The exemption is not in favor of farm or dairy products when hauled by non-farmers or any other regular transportation company, nor is the exemption in favor of farmers and/or dairymen when hauling general products, or hauling ordinary merchandise, but the exemption is operative only when the farm and/or dairy products are being hauled by farmers or dairymen. This, of course, makes a very much narrower class of operations that receive the benefit of the exemption. The whole exemption thus operates in favor of farming and/or dairying.

It is also common knowledge and a matter of general economic history well known to the Legislature and to the courts of the State of South Carolina and also to the public generally that the State of South Carolina is largely an agricultural state, where the great bulk of the people derive their livelihood from some form of agricultural operations.

It is likewise equally well known that as a general rule the farming and dairying industries of the State of South Carolina (and elsewhere, for that matter) have really been in great financial distress almost continuously for the past ten or twelve years—in fact, since the deflation of 1921. In fact, the plight of the farmer and of the agricultural industry generally is so great and so universal that the present national administration has set into motion a wide variety of agencies for the help and improvement of agricultural conditions throughout the country. The condition of the farmer is one of the serious problems of the time. These generally bad conditions affecting the agricultural industries generally have been applicable in a high degree in the State of South Carolina.

It is therefore respectfully submitted, for the foregoing reasons, that the Legislature of the State of South Carolina was fully justified in making this exemption in favor of the farming and dairying industries independently of, and in addition to, the consideration of the character and frequency of the use of the highways.

Authorities Show Such Exemption in Favor of Farmers and Dairymen Valid

The foregoing principles are, it is submitted, fully established and recognized by the above cited decisions of this Honorable Court, and also of other courts. It is submitted that they are in exact accord with the *ratio decidendi* of the above cited cases of *Continental Baking Company v. Woodring*, 286 U. S. 352, 76 L. ed. 816; *Sproles v. Binford*, 286 U. S. 374, 76 L. ed. 1167; and also *Schwartzman Service, Incorporated v. Stahl, et al*, 60 Fed. (2) 1934, and are not in any proper sense in conflict with the decision of this Honorable Court in *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264.

In the *Continental Baking Company* case the Act under consideration provided:

"This act shall not apply * * * to the transportation of live stock and farm products to the market by the owner thereof, or supplies for his own use in his own motor vehicle or to the transportation of children to and from school."

This Honorable Court upheld the exemption and distinguished the question in that case from the decision in the *Smith v. Cahoon* case.

"The distinction in the instant case" said the Court in rendering its decision, "is of a different sort. The statute does not attempt to impose any arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. In sustaining the exemption, the District Court referred to the factual basis for the distinction. 'The Legislature knew,' said the Court, 'that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt "contract carrier" employed by him. **The Legislature knew as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year.** The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all 'motor vehicles'. 55 F. (2d) at page 352. And the Court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The Court found a practical difference between the case of the appellants 'who operate fleets of trucks in the conduct of their business and who use the high-

ways daily in the delivery of their products to their customers', and that of 'a farmer who hauls his wheat or livestock to town once or twice a year'. **The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction.** As the Court said in *Alward v. Johnson*, 282 U. S., 509, 513, 514; 51 S. Ct., 273, 274; 75 L. ed., 496; 75 A. L. R., 9: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough.' See also, *Bekins Van Lines v. Riley*, 280 U. S., 80, 82; 50 S. Ct., 64; 74 L. ed., 178; *Carley & Hamilton v. Snook*, 281 U. S. 66, 73; 50 S. Ct., 204; 74 L. ed., 704; 68 A. L. R., 194."

(Emphasis ours.)

It is earnestly submitted that the point of the distinction made in the *Continental Baking Company* case by this Honorable Court between that case and the *Smith v. Cahoon* case is equally applicable and valid in the case at bar.

In the *Smith v. Cahoon* case the exemption was in favor of "any transportation company" which was engaged in hauling the type or variety of products therein mentioned, which, moreover, were not confined to farm or dairy products. In other words, any transportation company, under the statute there involved—that is, in the *Smith v. Cahoon* case—might, by engaging in the transportation of the variety of products therein favored, obtain exemption as against any other transportation company which did not engage exclusively in the transportation of those products. In the case at bar, on the other hand, as in the *Continental Baking Company* case, the exemption runs only in favor of farmers or dairymen, and when they are hauling the products of their own industry.

As we have already pointed out, the exemption does not run in favor of any other transportation company or of any other individuals who may engage in the transportation of farm or dairy products, but the exemption is confined exclusively to farmers or dairymen.

It is true that in the *Continental Baking Company* case the exemption was further limited by the exemption being confined to the transportation of such products "by the owner thereof", but it is submitted that this distinction is more apparent than real, and that, in fact, the exemption was very closely analogous to the exemption in the case at bar, since the exemption in the case at bar applies only in favor of those whose principal business is farming and/or dairying, when hauling farm or dairy products. The basis of the distinction, as approved by this Honorable Court in the *Continental Baking Co.* case, was the relative infrequency and slightness of the use to which the farmers would be able to put the highways, as compared with the "habitual and constant" use of the highways to which they would be put by those regularly engaged in the business of transport hauling. This distinction, it is earnestly and respectfully submitted, is equally applicable in the case at bar, and should be applied by this Honorable Court in favor of the Act in question.

Also, in the above cited case of *Sproles v. Binford*, there was a discrimination in favor of "implements of husbandry, including machinery used solely for the purpose of drilling water wells * * *", which exemption as to the implements of husbandry was construed to include plows, threshing machines, hay pressers, etc. The Court upheld this distinction upon the ground that such implements "must be moved from one place to another" "in order to carry on the business of farming", and that "the uses of the highways for this sort of transportation are temporary only, **and essential to the public welfare"** (76 L. ed. 1178). It is earnestly and respectfully submitted that this distinction, as thus made by this Honorable Court, it obviously sound and peculiarly applicable to the conditions in the State of South Carolina, and applicable to

the farming and dairying industries, which are "essential to the public welfare".

> "In exercising this authority over its highways", continued this Court, in language which is equally applicable to the case at bar, the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure. *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159, 74 L. ed. 775, 781, 50 S. Ct. 310. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586, 73 L. ed. 856, 860, 49 S. Ct. T. 430; *Price v. Illinois*, 238 U. S. 446, 452, 453, 59 L. ed. 1400, 1405, 1406, 35 S. C. 892; *Hadacheck v. Sebastian*, 239 U. S. 394, 410, 60 L. ed. 348, 356, 36 S. C. 143, Ann. Cas. 1917B, 927; *Euclid v. Ambler Realty Co.* 272 U. S. 365, 388, 71 L. ed. 303, 310, 54 A. L. R. 1016, 47 S. Ct. 144; *Zahn v. Board of Public Works*, 274 U. S. 325, 328, 71 L. ed. 1074, 1076, 47 S. Ct. 594."

In this case, also, this Honorable Court upheld a discrimination in favor of short hauls, notwithstanding the contention made by the carriers there, that this discrimination was made in order to favor the railroads. The exemption contained in the Act there in question was in favor of vehicles transporting "property from the point of origin to the nearest

practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination". This Court said:

> "But the legislature in making its classifications was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their extensive as well constant use of the highways brought about the conditions making the regulations necessary, *Continental Baking Co. v. Woodring*, 286 U. S. 352, ante, 1155, 52 S. Ct. 595 *supra*. It is said that the exception was designed to favor transportation by railroad as against transportation by motor trucks. If this was the motive of the legislature, it does not follow that the classification as made in this case would be invalid."

The Court further continued that this "is not a case of arbitrary discrimination between products carried, as in the Case of *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264, * * *. The discrimination is simply in favor of short hauls and of operations, which as the District Court found, are confined to small areas and greatly reduce the danger of traffic congestion and highway casualties". It is submitted that this principle is again applicable in the case at bar since, as a practicable proposition, even though not expressly stated in the Act, all hauls by the farmers and/or dairymen are necessarily relatively short. The above quotation is also significant as showing that this Honorable Court construed the *Smith v. Cahoon case* as being based upon the arbitrariness of the discrimination "between the products carried" and conversely as having no application whereas in the case at bar the discrimination runs not so much in favor of the class of products carried as in favor of the classes of persons—that is, farmers and dairymen—who are doing the carrying.

We also beg leave to adopt the further language of this Honorable Court in that case as being peculiarly applicable to the question involved in the case at bar:

"There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. *Silver v. Silver,* 280 U. S. 117, 123, 74 L. ed. 221, 225, 65 A. L. R. 939, 50 S. Ct. 57. The State is not bound to cover the whole field of possible abuses. *Patsone v. Pennsylvania,* 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 S. Ct. 281. The question is whether the classification adopted lacks a rational basis. *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 S. Ct. 337, Ann. Cas. 1912C, 160; *Keokee Consol. Coke Co. v. Taylor,* 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 S. Ct. 856; *Miller v. Wilson,* 236 U. S. 373, 384, 59 L. ed. 628, 632, L. R. A. 1915F, 829, 35 S. Ct. 342; *Carley & Hamilton v. Snook,* 281 U. S. 66, 74 L. ed. 704, 68 A. L. R. 194, 50 S. Ct. 204, *supra; Smith v. Cahoon,* 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582, *supra.* We can not say that such a basis is lacking in this instance."

Likewise in the above cited case of *Schwartzman Service v. Stahl,* decided by the Missouri (Three-Judge) District Court, the exemption provisions contained in the Act in question were as follows:

"'The provisions of this Act shall not apply to . . . motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors.'

The Court upheld the provision in an able opinion, which it is submitted is essentially sound, and established the basis for a discrimination in favor of farmers and farm products.

'It is the main contention of the plaintiff,' said the Court, *passim,* 'that said enactment is unconstitutional because discriminatory in favor of "motor vehicles used

exclusively in transporting farm and dairy products, etcetera."'

"1. At the outset it must be acknowledged that the state has the power to regulate vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. *Buck v. Kuykendall*, 267 U. S. 307, 1. c. 314; *Stephenson v. Binford, et al*, 53 Fed. (2) 509.

"Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the State in its discretion, without violating either the due process clause or the equal protection clause.' *Packard v. Banton*, 264 U. S. 140, l. c. 144.

"The highways belong to the State. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. *Kane v. State of New Jersey*, 242 U. S. 160.

"2. Assuming, therefore, the power and right of the State to regulate and supervise its highways, such right can not be hampered or restricted within narrow bounds.

"On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the State 'has a broad discretion in classification in the exercise of its power of regulation.' *Smith v. Cahoon*, 283 U. S. 553, l. c. 586. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary.

. . .

"4. With the foregoing principles of law in mind as postulates, the constitutionality of the provision assailed may be considered. The alleged discriminatory or unequal

provisions apply alike in favor of both common carriers and contract haulers when their motor vehicles are 'used exclusively in transporting and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market.'

"It was in evidence that the trucks so used, and subject to the exemption, are owned and operated by farmers in gathering such agricultural products, as live stock, cream and milk, from individual farmers and transporting such products to local towns where they are shipped by rail to the city markets. **Many of such uses are seasonal and involve very moderate use of the highway.**

. . .

"It is the law that even though an exemption is a clear discrimination, it is not invalid unless arbitrary. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, l. c. 418. In fact the legislative classification may rest on narrow distinctions as decided in *German Alliance Ins. Co. v. Kansas, supra.*

"It must be conceded that the interest of the public is involved in the gathering and marketing of farm products as speedily and economically as possible. The Legislature no doubt had in mind the facts, as same have been made to appear to us, that the only use made by trucks within the exemption would be in gathering the products of the farmer and transporting them to the nearest shipping point.

"Necessarily, this would not involve an extensive use of the highways. In a few instances, no doubt the farmer would live on the State-owned and controlled highway, but in most instances this would not be true.

"In the majority of cases the farmers first reach the State highways at the place of marketing their products. In such cases they would not use the State highways at all. The highways would not be used by the farmer in marketing his product as much as the con-

tract hauler and motor carrier would use the same highways within cities and suburban zones:

"Moreover, long hauls could not be economically made under this exemption. The motor vehicle employed must return empty as farm products could not be hauled both ways to market. Again, large heavy trucks could not be used in gathering farm products. Much of the time such trucks would be off of hard surfaced roads.' (Emphasis ours.)

Act Construed as Not Exempting Farmers and Dairymen if Regularly Engaged in Transport Hauling

Also it is to be noted that the Railroad Commission has in fact construed this exemption, and has adopted a regulation to this effect, as applying only in favor of farmers and dairymen "who occasionally but do not regularly as a part of an established business haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations, but who make a regular business of transporting farm and/or dairy products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act . . . .". (see reply, par. 1).

It is thus apparent that the Railroad Commission has, in fact, construed the Act as meaning that one who really makes a regular business of transport hauling, even though he may also be a farmer, is not entitled to the benefits of the exemption contained in the Act. In other words, insofar as one in fact makes transport hauling a regular business, he is not to be deemed a farmer for the purposes of the construction of the Act.

It is submitted that this is an entirely permissible construction for the Commission to put upon this Act. The question of who is or is not a farmer is, of course, a question of fact, and the Commission, it is submitted, has the inherent right, in construing and applying the Act, to determine that one who is regularly engaged in the business of transport hauling, is not, in fact, a farmer.

It is submitted, therefore, that the appellant in no event has any valid basis for complaint in this case. As was well stated by this Honorable Court in the *Continental Baking Co.* case above, the court should exclude from consideration "mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which this statute was addressed". This case in fact, it is submitted, falls within the principle of the above cited *Stephenson v. Binford,* (77 L. ed. 203, 214), to the effect that "so far as appears no attempt has yet been made to enforce the provisions against any of these appellants, and until that is done they have no occasion to complain".

It should also be noted in this connection that the exemption in favor of farmers or dairymen, should normally and properly be applied and has been, in fact, so applied by the Commission in favor only of natural persons who are engaged in farming or dairying, as distinct from corporations or companies. This question, it is submitted, furnishes a valid basis of distinction and discrimination in support of the Act. It also furnishes a valid basis of distinction from the above cited *Smith v. Cahoon* case, wherein the exemption which was disallowed by this Honorable Court was in favor of "any transportation company".

In the above discussed cases (*Continental Baking Co. v. Woodring,* 286 U. S. 352, 76 L. ed. 1167; and *Sproles v. Binford,* 286 U. S. 374, 76 L. ed. 1167), and in the *Schwartzman Service, Inc. v. Stahl* case (60 Fed. (2) 1034), and in the decision of the South Carolina Supreme Court, the *Smith v. Cahoon* case (283 U. S. 553, 568 75 L. ed. 1264), upon which the appellant relies so heavily, was distinguished by this Honorable Court and the other courts concerned.

It is submitted that the *Smith v. Cahoon* case may be validly distinguished in this case, as it was in the above cases and as has been indicated in the foregoing discussion, for the following, among other, reasons:

(a) The *Smith v. Cahoon* case dealt with a criminal prosecution. The Court stressed this point saying: "It should be observed that this is not an action in equity where the enforcement of a statute awaits the final determination of the court as to validity and scope." (75 L. ed. p. 1273)

(b) In the *Smith v. Cahoon* case the discrimination was in favor of "any transportation company" engaged in hauling the class of products therein mentioned.

In the case at bar, however, the discrimination is in favor of farm and dairy products **only when hauled by farmers and dairymen,** and in favor of lumber haulers engaged in transporting lumber and logs from the forest to the shipping points. In other words the discrimination in the case at bar relates not only to the class of products, but also to the class of persons engaged in the hauling.

The point of the distinction is that under the statute involved in the *Smith v. Cahoon* case any transport company, that is any regular organized transportation company, could become engaged exclusively in hauling the class of products concerned and hence be exempt, whereas in the case at bar the exemption operates only in favor of farmers and dairymen and lumber haulers and would not be applicable in favor of any indiscriminate transportation company. In other words there is a double element involved in the classification in this case, both as to the class of persons and also as to the class of products, whereas there was only one element of classification involved in the *Smith v. Cahoon* case, i. e. as to the class of products.

(c) Also in this connection it should be noted that the decision in this *Smith v. Cahoon* case, which was decided from Florida in the year 1931, is not necessarily applicable to the State of South Carolina at this time, where the economic and general conditions are materially different from conditions in Florida (see *Block v. Hirsch,* 256 U. S. 135, 65 L. ed. 865). As was stated by this Court in the above cited case "plainly circumstances may so change in time or so differ in space" as to justify one conclusion as to one particular set of circum-

stances or a particular time, and a different conclusion as to another time and place. Also in this connection it is to be noted the the exemption in the *Smith v. Cahoon* case ran not only in favor of farm and dairy products but also in favor of fresh and salt fish and oysters and shrimp.

It is submitted, therefore, that under the above discussed decisions and for the foregoing reasons, a valid discrimination may be made in favor of farmers and dairymen hauling farm and dairy products, in view of the limited seasonal use made by them of the highways, and also in view of the close relation between the farming and dairying industries and the public welfare, and that the *Smith v. Cahoon* case is inapplicable to the case at bar.

The remaining objections sought to be raised by the appellant to the Act, it seems to us, require relatively little consideration. It is also impossible for us at this time, in the absence of appellant's argument, to understand which of these contentions are intended to be pressed by the appellant before this court.

II.

Provisions as to Cargo Insurance and Regulation of Rates and Fares not Attempted to be Enforced

The points sought to be raised by the appellant in his answer in the Court below (par. 7) and also in the "statement as to the jurisdiction," and in the Assignments of Error (Nos. 2 and 5) in regard to (a) cargo insurance and (b) in regard to the Commission's being charged with the duty of regulating the rates and fares of appellants and others in like situations, may be sufficiently answered, it is submitted, by the simple fact that there has been no showing that the Commission has ever undertaken to enforce the said provisions of the Act as against the appellant or others in like situations—in fact it was conceded in the answer (see par. 7) that the Commission

had never undertaken to regulate appellants' rates or charges (see the *Continental Baking Co. v. Woodring* case, supra; and *Stephenson v. Binford*, 77 L. ed. 203).

As was stated by this Honorable Court in the *Stephenson v. Binford* case, "so far as appears, no attempt has yet been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain."

Also, as was held by the court in the *Continental Baking Co.* case the court will exclude from consideration "mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed."

Moreover, as to the matter of cargo insurance, the Supreme Court of South Carolina specifically held (see part 11 of the Opinion) that the said section of the Act (8511) with regard to cargo insurance, complained of by appellant, did not apply to the appellant and did not authorize the Commission to require the appellant to furnish such cargo insurance. It is established by authorities too numerous to mention that the decision of the State Supreme Court construing the state statutes will be accepted as final and conclusive by this Honorable Court, and hence this decision of the South Carolina Supreme Court removes the grounds of this complaint against the statute.

(Also it may be noted that the language of this section of the Act (Sec. 8511) is quite complicated and involved, and the Supreme Court of South Carolina was amply justified in holding that the Act cannot be construed as authorizing the Commission to require cargo insurance from the appellant and others, which might render said section unconstitutional, under the decision of this Court in *Michigan Public Utilities v. Duke* (266 U. S. 560, 69 L. ed. 445).)

III.

License Fees Based on Carrying Capacity in Tons Valid and Reasonable

As to the point which we assume is intended to be made by Point III of the Statement of Points, and by Assignment III, to the effect under section 8512 of the Acts the license fees are based wholly on carrying capacity, it is submitted that it is sufficient to point out that this point was not raised by the appellant's answer and hence need not be considered by this Court, under the established principle that constitutional objections must be raised at the first opportunity.

The point, however, was raised in the State Supreme Court, but was, it is submitted, properly disposed of by the South Carolina Supreme Court in its decision (see part III thereof) under the established principle that "a state which at its own expense furnished special facilities for the use of those engaged in intrastate and interstate commerce, may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce."

Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445;

Interstate Busses Corporation v. Blodgett, 276 U. S. 245, 72 L. ed. 551;

Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 59 L. ed. 750.

(See also the Case of *Continental Baking Company v. Woodring, supra*, and the Case of *Sproles v. Binford, supra*.)

In regard to this the South Carolina Supreme Court said:

> "We have made a careful examination of the authorities with reference to this particular contention and think it is without merit. Such fees are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use. Further, they are reasonable as to amount and tend to contribute to the protection of the highways. We do not think that the

provision of the act here complained of constitutes an undue burden on interstate commerce."

It is submitted that this decision of the South Carolina Supreme Court is fully supported by the above cited and many other decisions of this Honorable Court.

> "A State which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 167, 71 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. Such regulations are deemed to be reasonable and to affect interstate commerce only incidentally and indirectly."
>
> *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105.

It is settled that the State may impose taxes upon the intrastate operations of a motor carrier though such motor carrier is also engaged in interstate operations.

> *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, 72 L. ed. 551.

In a case of this sort the burden is upon the plaintiff to show that in actual practice the tax operates to deprive him of his constitutional rights.

> See *Interstate Busses Corporation v. Blodgett, supra.*

The Federal Supreme Court "must indulge the presumption until the contrary is made to appear that the state will not so construe or enforce the order as to interfere with or obstruct such commerce. Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 369, ante, 265, 274, 35 Sup. Ct. Rep. 99."

> *Michigan C. R. Co. v. Michigan R. Commission*, 236 U. S. 615, 35 Sup. Ct. Rep. 422, 59 L. ed. 750, at page 758.

It is apparent, it is submitted, that the carrying capacity in tons of the trucks for which the licenses are prescribed (in section 8512 of the Act) has a direct and immediate relation to the amount of use and wear and tear which said vehicles will impose upon the highways. Hence the State Legislature was fully justified in adopting this criterion of the carrying capacity of the trucks as the basis for fixing the amount of the license. Of course it is humanly probable that the trucks of the greater carrying capacity will be larger and carry greater loads, and hence will impose a greater use upon the highways and produce greater wear and tear thereon. Hence, under every principle of reason, the amount of the licenses might well be graduated in accordance with the carrying capacity of the vehicles in question.

It is hard to conceive of any better basis for fixing the amount of such license fees, but even if some more scientific and accurate criterion might be devised it is submitted that the practical convenience of such a classification, when taken in connection with its reasonablness, is sufficient to justify its adoption.

"The practical convenience of such a classification," as was stated by this Court in the *Continental Baking Company* case, above, though in regard to a different matter, "is not to be disregarded in the interest of a purely theoretical or scientific uniformity." *Columbus & G. R. Co. v. Miller,* 283 U. S. 96, 101, 75 L. ed. 861, 866, 51 S. Ct. 392; *Dow v. Beidelman,* 125 U. S. 680, 691, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 S. Ct. 1028; *New York, N. H. & H. R. Co. v. New York,* 165 U. S. 628, 633, 634, 41 L. ed. 853-855, 17 S. Ct. 418; *Chicago, R. I. & P. R. Co. v. Arkansas,* 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; *Chesapeake & O. R. Co. v. Conley,* 280 U. S. 513, 522, 57 L. ed. 1597, 1603, 33 S. Ct. 985; *St. Louis, I. M. & S. R. Co. v. Arkansas,* 240 U. S. 518, 521, 60 L. ed. 776, 779, 36 S. Ct. 443; *Wilson v. New,* 243 U. S. 332, 341, 354, 61 L. ed. 755, 770 776, L. R. A. 1917E, 938, 37 S. Ct. 298, Ann. Cas. 1918A, 1024; *Clark v. Maxwell,* 282 U. S. 811, 75 L. ed. 726, 51 S. Ct.

211; *Chicago, R. I. & P. R. Co. v. United States*, 284 U. S. 80, 93, ante, 177, 184, 52 S. Ct. 87.

The argument suggested by the appellant in his statement as to the jurisdiction on this point to the effect that under this statute this last tax would have to be paid by an interstate carrier for a single trip into this state, seems to us to be a far fetched and unreasonable interpretation of the statute, particularly in view of the express provision of section 8522 of the Act to the effect that the provisions of the Act should not be construed "to prevent the use or hiring of any motor vehicle for the purpose of making some particular trip, where the owner of such motor vehicle does not make such transportation a business."

Certainly we apprehend it would not be held that the making of a single trip into this state would constitute making "such transportation a business" so as to bring such carrier within the operation of the statute. In any event this alleged or fancied basis of objection is inapplicable to the appellant, since it has been, in effect, admitted by the appellant that he is regularly in the business of motor transportation over the highways of the State of South Carolina and also in interstate operations (see paragraphs 2, 3 and 4 of the petition, and paragraphs 1 and 2 of the answer; and also see appellant's reply and the affidavit of W. W. Goodman, thereto attached).

Again it is submitted that the holding of this Honorable Court in the above cited *Continental Baking Company* case that "mere hypothetical and fanciful illustrations" of illegalities in the Act must be disregarded, is applicable also to this contention.

The cases cited by the appellant in his statement as to the jurisdiction in support of his contention on this point (*Interstate Transit, Inc., v. Lindsey*, 283 U. S. 183, 75 L. ed. 953; *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199), not only failed to support appellant's contentions, but on the contrary are di-

rectly authority for our views as herein above stated. In the case of *Clark v. Poor, supra*, the tax was graduated, as stated by this Honorable Court, "according to the number and capacity of the vehicles used." This Court upheld this tax even as applied to those engaged exclusively in interstate operations.

"The highways are public property"

said this Court, in rendering its decision.

> "Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. *Morris v. Duby*, No. 372, decided April 18, 1927 (274 U. S. 135, ante, 966, 47 Sup. Ct. Rep. 548). Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; *Hess v. Pawloski*, No. 263, decided May 16, 1927 (274 U. S. 352, ante, 1091, 47 Sup. Ct. Rep. 632). Compare *Packard v. Banton*, 264 U. S. 140, 144, 68 L. ed. 596, 607, 44 Sup. Ct. Rep. 257."

Likewise in the case of *Interstate Transit, Inc., v. Lindsey*, while the particular tax therein involved was held and construed to be a tax upon the privilege of engaging in interstate commerce, and hence invalid, the Court nevertheless recognized and stated that the State "may impose even upon motor vehicles engaged exclusively in interstate commerce a charge as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon (*Kane v. New Jersey*, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 S. Ct. 30; *Clark v. Poor*, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; *Sprout v. South Bend, supra* (277 U. S. 169, 170, 72 L. ed. 836 837, 62 A. L. R. 45, 48 S. Ct. 502))", and also that where it

appears that the tax or license is levied for such purpose, "it will be sustained unless the tax payer shows that it bears no reasonable relation to the privilege of using the highways, or is discriminatory.

Hendrick v. Maryland, 235 U. S. 610, 612, 59 L. ed. 385, 35 S. Ct. 140; *Interstate Busses Corp. v. Blodgett*, 276, U. S. 245, 250-252, 72 L. ed. 551, 554, 555, 48 S. Ct. 230. Compare *Interstate Busses Corp. v. Holyoke Street R. Co.* 273 U. S. 45, 51, 71 L. ed. 530, 534, 47 S. Ct. 298."

IV.

General Appropriation Act of 1932 Not properly Involved

As to the contention advanced in Point 4 and in Assignment of Errors No. 4, it is sufficient to point out that this point relates solely to the contemplated appeal by the *Blalock Motor Express, Inc.*, which has been abandoned, and to the General Appropriation Act of 1931, which is not in any sense involved in this case. In fact, the General Appropriation Act of 1932, in this respect, so far as the levying of an assessment upon the gross receipts of the motor vehicle carriers is concerned, is different from the 1931 Act; also the abandonment of the Blalock Motor Express, Inc. appeal renders this point entirely academic.

As to the contention sought to be advanced in Point 5 (c) in the papers served on appellees' counsel of May 23, 1933, it is sufficient, it is submitted, to point out that this contention was not raised in the answer nor presented in any form to the South Carolina Supreme Court, or even in the petition for appeal or the Assignment of Errors therein contained, or even in the statement as to the jurisdiction, thereto attached. The contention in question seems to be that the provision of the General Appropriation Act of 1932 (sec. 34, Act No. 897, XXXVII S. C. Statutes at Large, 1557 at p. 1606), levying an assessment upon the motor carriers of the state for the support of the Railroad Commission, is invalid for the alleged reason that such assessment is not

in lieu of all other taxes. This alleged point was not only not presented in any form in the Court below, or touched upon by the Court in its decision, but was entirely beyond the scope of the issues in this case, since the suit itself was brought, as was stated in the petition (par. 7) for the purpose of enforcing the Motor Regulatory Act of 1925 as amended (now embodied in chapter 162 of the Code of 1932, sections 8507–8530), and did not in any way relate to the Act mentioned in said point—to-wit, section 897 of the 1932 Code, which was the General Appropriation Act for that year.

SUMMARY AND CONCLUSION

From all the foregoing reasons and many others which will no doubt occur to this Honorable Court, it is respectfully submitted that the judgment of the South Carolina Supreme Court should be affirmed by this Honorable Court, and the appeal dismissed.

The only question involved in this appeal, it seems to us, to merit serious consideration is the question as to the exemption in favor of farmers or dairymen hauling farm or dairy products. As to this point it is respectfully submitted that a valid distinction should be made in favor of farmers or dairymen hauling farm and dairy products, inasmuch as the evidence in this case clearly discloses that farmers and dairymen hauling farm and dairy products will and do make a much less frequent and less burdensom use of the highways than the appellants and others regularly engaged in the business of motor transporation for hire and also because farming and dairying and other agricultural operations ar entitled, by reason of their lying at the basis of the economic structure of the State of South Carolina, to special consideration at the hands of the South Carolina Legislature. This principle is established and applied by many of the decisions of this Honorable Court, and it is respectfully submitted is peculiarly applicable to the case at bar. Also the license fees being based on carrying capacity in tons of the

motor vehicles in use, are valid and reasonable as bearing a reasonable relation to the probable use to be made of the highways by the motor vehicles in question.

The remaining contentions advanced by the appellant in regard to the cargo insurance and in regard to having their rates and fares regulated by the South Carolina Railroad Commission, are mere fanciful and hypothetical objections, and hence will be disregarded by this Court.

It is, therefore, respectfully submitted that this appeal is without merit, and the judgment of the South Carolina Supreme Court should be affirmed.

JOHN M. DANIEL, Attorney General,
IRVINE F. BELSER, Special Counsel,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1933.

M. D. Hicklin, Individually, etc., Appellant,
vs.
J. C. Coney, Earle R. Ellerbe, Sam C. Blease, et al., as Members of and constituting the Railroad Commission of South Carolina.

Appeal from the Supreme Court of the State of South Carolina.

[December 4, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Railroad Commission of South Carolina brought this suit in the original jurisdiction of the Supreme Court of the State seeking the enforcement of the state statutes regulating transportation by motor vehicles.[1] The petition alleged that the respondents below, including the present appellant, fell within Class "F" of motor vehicle carriers, that is, those known as contract carriers of property, not proposing to operate upon a regular schedule or over a regular route, and that they were carrying on their business on the public highways without having obtained the required certificates or paying the prescribed license fees. Appellant demurred to the petition and also made return and answer. The petitioners filed reply. Appellant contended that the statutory requirements, as applied to him as a private contract carrier, denied the equal protection of the laws and deprived him of due process of law in violation of the Fourteenth Amendment, and also, as he was engaged in interstate transportation, were repugnant to the commerce clause of the Federal Constitution. The Supreme Court of the State decided the Federal questions adversely to these contentions. 168 S. C. 440.

[1]Sections 8507 to 8530, Chapter 162 of the Code of 1932; Acts of 1925, p. 252, of 1928, p. 1238, of 1930, pp. 1068, 1100, 1327, and of 1931, p. 145.

First. It was competent for the State in exercising its control over the use of the highways to make reasonable regulations governing that use by private contract carriers. These regulations may require on the part of interstate as well as intrastate carriers the payment of reasonable license fees and the filing of insurance policies to protect the interests of the public by securing compensation for injuries to third persons and their property from the negligent operations of such carriers. *Continental Baking Co.* v. *Woodring* 286 U. S. 352, 365, 366; *Stephenson* v. *Binford,* 287 U. S. 251, 274, 277. The statutory requirements, in this instance, do not compel private contract carriers to become common carriers. *Stephenson* v. *Binford, supra,* pp. 265, 275. The contention that private contract carriers are required to carry "cargo insurance" (*Michigan Commission* v. *Duke,* 266 U. S. 570, 577) is unavailing in view of the construction to the contrary placed upon the statute by the state court. That court said:

"Our statute, however, like that construed in the *Stephenson* case, expressly recognizes the distinction between common carriers and private contract carriers; and from an examination of the entire act it is clear that the Legislature did not intend to put common carriers and private contract carriers on the same footing with regard to the matters here complained of. We think, and so hold, that in the case of private carriers, or contract carriers, the provisions of section 8511 extend no further than to require such carriers to execute an indemnity bond, as the commission may prescribe under the provisions of the act, for the protection of the public receiving injury, either in person or in property, by reason of any act of negligence of such private or contract carriers. We do not think it was the intent of the Legislature, in the passage of the act, to require contract carriers to obtain and carry cargo insurance, and we construe the act as not imposing upon them such requirement".

Appellant complains of this construction of the statute as being contrary to its terms, but that question is not for us. The decision of the state court is controlling as to the meaning and extent of the statutory requirements. *St. Louis, Southwestern Rwy. Co.* v. *Arkansas,* 235 U. S. 350, 362; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32, 33; *American Railway Express Co.* v. *Royster Guano Co.,* 273 U. S. 274, 280. Nor does the statute as construed exhibit a fatal defect of indefiniteness. Its requirements as to the appellant, as the state court has defined them, are not uncertain.

Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, "if any it has under the act", and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. *Stephenson* v. *Binford, supra,* p. 277.

Second. Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the "carrying capacity" of the vehicles. The state court held that the fees "are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use". The statute provides for the segregation, for this purpose, of the moneys collected. See *Clark* v. *Poor,* 274 U. S. 554, 555-557. In this view the fees are not open to the objection raised in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. *Morris* v. *Duby,* 274 U. S. 135, 143; *Sproles* v. *Binford,* 286 U. S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose. *Clark* v. *Poor, supra.*

Third. The contention that appellant has been denied the equal protection of the laws is based on the discrimination resulting from the exemption of "farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points". Section 8508. Reliance is placed on our decision in *Smith* v. *Cahoon,* 283 U. S. 553. In that case, the statute applied to all carriers for compensation over regular routes and exempted from its provisions "any transportation company engaged exclusively in the transporting of agricultural or horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of pro-

duction to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products." This distinction was thus established between all carriers, and between private carriers, notwithstanding the fact that they were "alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route". The Court was unable to find any justification for this discrimination between carriers in the same business and operating under like circumstances, that is, between those who carried for hire farm products, or milk or butter, or fish or oysters, and those who carried for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. *Id.*, pp. 566, 567.

In *Continental Baking Co.* v. *Woodring, supra,* pp. 372, 373, the statutory exemption ran to one "who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicles". Attention was called to the factual basis for the distinction as it had been pointed out by the District Court, which found a practical difference between the case of those "who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers" and that of "a farmer who hauls his wheat or livestock to town once or twice a year". This Court said that the legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction. The Court quoted the observation in *Alward* v. *Johnson,* 282 U. S. 509, 513, 514: "The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough".

The exemptions in the instant case are not as limited as that in *Continental Baking Co.* v. *Woodring,* but they differ materially from that found to be objectionable in *Smith* v. *Cahoon.* The state court thus construed the scope, and described the effect, of the exemption in favor of farmers and dairymen: "Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use

of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying". Further, in its pleading, the Railroad Commission averred that it had uniformly construed the statute "as exempting farmers and dairymen only when hauling their own product, or only when hauling them occasionally and not as a regular business" and had adopted a formal regulation to that effect.[2] In support of its pleading, and made a part of it, the Commission presented an affidavit by the Superintendent of the Motor Transportation Division of the Commission showing the manner in which the statute had been applied.

The state court in its opinion said that it reached its conclusion as to the validity of the statutory provision "independently of the construction placed by the Railroad Commission upon the contested provision of the Act". And the court pointed out that that construction was "in part" unsound inasmuch as "one hauling his own products in his own motor vehicle" did not come within the purview of the Act and no provision for his exemption was necessary. "The exemption", said the court, "can refer only to farmers and dairymen hauling farm and dairy products for compensation". The state court, however, did not express disagreement with the Commission's construction set forth in its regulation, that the exemption applied "to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or

[2]This regulation is as follows: "The proviso under Section 2 of Act No. 170 of the Acts of 1925, as amended, providing that nothing contained in said section shall apply to farmers or dairymen hauling dairy or farm products is construed by the Railroad Commission in the performance of its duties in the enforcement of said Act to mean that nothing in the said section shall apply to farmers or dairymen hauling their own dairy or farm products, or to farmers and dairymen who occasionally, but do not regularly as a part of an established business, haul farm and/or dairy products for others for hire, but that persons who may also be engaged in part in farming operations but who make a regular business of transporting farm and/or dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the act in all respects like other persons engaged in motor transportation for hire."

dairy or other products for others for hire are not to be deemed farmers or dairymen for the purpose of this Act, and hence are required to comply with the Act in all respects like other persons engaged in motor transportation for hire". Nor have we anything before us to show that the statute is being enforced and the exemption construed in any other sense. Upon the present record, it appears that the exemption is applied with two limitations, *first*, that, as construed by the state court, it can refer only "to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying", and, *second*, under the construction of the Commission in enforcing the statute—a construction not disapproved by the state court—that it applies only to farmers and dairymen who occasionally, and not as a regular business, transport farm or dairy products for compensation. We cannot say that a classification based on such a use of the highways is an arbitrary one and thus encounters constitutional objection.

The exemption in favor of those hauling lumber and logs "from the forest to the shipping points" relates to a limited class of transportation simply to places of shipment and does not appear to be unreasonable. See *Sproles* v. *Binford, supra,* p. 394.

The judgment of the state court is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.